

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**TRACY A. MCHALEY**

Claimant

V.

**FULL VISION, INC.**

Respondent

AND

**CINCINNATI INSURANCE COMPANY**

Insurance Carrier

Docket Nos. 1,069,085  
& 1,069,086

**ORDER**

Respondent and insurance carrier (respondent), through D. Steven Marsh, request review of Administrative Law Judge Thomas Klein's May 24, 2016 preliminary hearing Order. Mitchell W. Rice appeared for claimant.

The record on appeal consists of the April 23, 2014 preliminary hearing transcript, the April 17, 2014 deposition of claimant, the May 19, 2014 deposition of David Csitkovits, the May 22, 2014 deposition of Juan Maldonado, the May 22, 2014 deposition of Jonathan Walker, the May 22, 2014 deposition of Chris Gillette, and the May 22, 2014 deposition of Douglas Pauls and all exhibits in Docket No. 1,069,085, the December 10, 2014 settlement hearing transcript held in Docket No. 1,069,086, and all pleadings in the administrative file.

**ISSUES**

In Docket No. 1,069,085, claimant alleged a work-related injury to his low back on June 1, 2013. A preliminary hearing was held on April 23, 2014. The record was left open for depositions that were completed by May 22, 2014. Just over two years later, the judge found claimant sustained personal injury by accident arising out of and in the course of his employment and gave proper notice of the accidental low back injury.

Docket No. 1,069,086 was settled on December 10, 2014, closing out all issues.

The issues are:

1. Did claimant sustain personal injury by accident arising out of and in the course of his employment on June 1, 2013, including whether his asserted accident was the prevailing factor causing his injury?
2. Did claimant provide timely notice of the June 1, 2013 work injury pursuant to K.S.A. 2013 Supp. 44-520?

FINDINGS OF FACT

Respondent is a metal fabrication company that makes tractor parts and treadmills. Claimant, 60 years old, began working for respondent as a temporary employee in approximately January 2011. On April 16, 2012, he was hired full-time by respondent and began running a machine that bends metal tubes, appropriately called a "bender."

On June 1, 2013, claimant was bending metal framework for Monaco Coach® buses. The framework was two by eight inches wide, a quarter inch thick and weighed about 200 pounds. Claimant felt a pop in his low back while lifting the framework. His coworker, Juan Maldonado, asked if he was okay and claimant told him he hurt his back. After taking a 10-15 minute break, he went to look for Chris Gillette, who he testified was his supervisor. While doing this, he ran into David Csitkovits, a coworker, and mentioned hurting his back.

Claimant met Mr. Gillette near another bender. He testified Juan Maldonado, David Csitkovits and Jonathan Walker, all coworkers, were also present. In describing his conversation with Mr. Gillette, claimant testified:

- A. I said I hurt my back while I was running this Monaco [C]oach.
- Q. What was his response?
- A. He said - - his first response? "How far are you getting done with it?"
- Q. Then what did he say?
- A. I'm trying to think. He said "Well, try to hurry up and get it done."
- Q. All right. Anything else?
- A. I believe it was, and this is the words "Suck it up."<sup>1</sup>

Claimant did not request medical treatment. He did not ask to fill out an accident report. He continued working his regular job but testified his back was sore. The following week, claimant reminded Mr. Gillette about his back and was told, "Suck it up . . . ."<sup>2</sup> While claimant's back continued to hurt, he did not speak with anyone else in a supervisory capacity because he feared losing his job. Claimant alleged a prior worker's employment was terminated after a workers compensation injury.

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<sup>1</sup> Claimant Depo. at 23-24.

<sup>2</sup> *Id.* at 26.

In late-August 2013, claimant approached Douglas Pauls, respondent's quality assurance and safety manager, about his back. While claimant could not recall if he had previously notified Mr. Pauls of his injury, he believed Mr. Pauls was aware of it from being told by other employees. In describing his conversation with Mr. Pauls, claimant testified:

Q. So, tell me about that conversation. You said "What are we going to do about my back?"

A. Yeah.

Q. And what was Doug's response?

A. Doug's response was "Tracy, you're so close to surgery, let's go ahead and have surgery on your shoulder, and that's going to be some time off that you're going to be off for quite a while now and we'll see if your back gets any better, and if it does not get any better or anything like that, we'll take care of it."<sup>3</sup>

On September 4, 2013, claimant underwent shoulder surgery in an unrelated matter and was taken off work. In February 2014, claimant advised Mr. Pauls that his back was not getting better. After speaking with human resources, Mr. Pauls had claimant complete an incident report regarding his back.

When he testified on April 17, 2014, claimant complained of a constant ache located about four or five inches above his belt line with pain going up and down his back. On a couple of occasions, he experienced numbness and tingling down his right leg to the bottom of his foot.

Mr. Csitkovits worked for respondent for almost 16 years and he previously was a lead worker. He stated he was present during the conversation between claimant and Mr. Gillette on June 1, 2013, perhaps three or four feet away. He was wearing hearing protection. Mr. Csitkovits testified, "Tracy said that he had hurt his back bending the Monaco Coach and that it was bothering him and Chris told him to suck it up and go back to work."<sup>4</sup> Mr. Csitkovits stated Mr. Gillette was in a supervisory position, even though he was at "the bottom of the totem pole."<sup>5</sup>

Mr. Csitkovits is claimant's friend or acquaintance. He was terminated from respondent's employment in December 2013. Respondent asserted he is a disgruntled, former employee.

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<sup>3</sup> *Id.* at 28.

<sup>4</sup> Csitkovits Depo. at 7.

<sup>5</sup> *Id.* at 10.

Mr. Maldonado, respondent's former employee, did not recall the actual day of claimant's accident, but testified there were occasions when he and claimant would have to switch positions because claimant would indicate he was "tired" or the pieces were "getting too heavy."<sup>6</sup> Mr. Maldonado remembered conversations where claimant complained to supervisors about his back. He acknowledged Mr. Gillette responded by telling claimant to hurry up and get the work done.

Mr. Gillette has worked for respondent as a working lead man for two years. His work duties include ensuring jobs are lined out and have adequate materials, in addition to quality control and making sure employees show up and perform their work. According to Mr. Gillette, he is not a supervisor nor a member of management.

While he is unsure of the specific date, Mr. Gillette testified claimant told him "[t]hat he felt something pop in his back or he had a sore back."<sup>7</sup> He indicated claimant did not say he had hurt his back, only that it was sore, which is not uncommon with the kind of work they perform. Mr. Gillette testified he asked claimant if he needed to leave or whether he could continue working. Claimant did not request medical treatment nor ask to fill out an accident report. Mr. Gillette testified he first became aware that claimant was claiming a work injury on April 22, 2014. Mr. Gillette stated that if claimant had told him about a work injury, he would have taken him to first aid and then to Mr. Pauls.

Mr. Walker, a machinist for respondent and not a supervisor, had no recollection of witnessing claimant report an injury by accident to Mr. Gillette. He testified he could not recall the date, but noted claimant told him he hurt his back at the bender. In response, Mr. Walker told claimant to tell Mr. Gillette, Skip Connor (a supervisor) and Mr. Pauls because "those are the people that can make whatever decision that needs to be made, whether he needs to go home or whatever."<sup>8</sup>

Mr. Pauls has worked for respondent for 28 years. Mr. Pauls testified claimant mentioned to him that his back was hurting some time in mid-July 2013, but did not relate it to a work injury. Mr. Pauls admitted he may have said something to claimant about waiting until after his shoulder surgery because claimant was on light duty at the time and claimant would say "his back was getting better or his back . . . wasn't hurting . . . ."<sup>9</sup> Mr. Pauls testified claimant never said why his back was hurting or related it to a specific incident.

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<sup>6</sup> Maldonado Depo. at 8.

<sup>7</sup> Gillette Depo. at 7.

<sup>8</sup> Walker Depo. at 7. See also p. 9 ("Q. You told him to go tell one of the supervisors who you mentioned? A. Yes.").

<sup>9</sup> Pauls Depo. at 7.

Mr. Pauls testified he first became aware claimant was alleging a work-related low back injury around January 22, 2014, from a secondhand source, and the first time claimant notified him of the work-related injury was on February 18, 2014, when he told him about the Monaco Coach® incident and asked to file a claim on his back. An incident report was completed on February 26, 2014.<sup>10</sup>

On cross-examination, Mr. Pauls testified the crew leads, including Mr. Gillette, are the “direct supervision over the workers.”<sup>11</sup> It was Mr. Pauls understanding that claimant had talked to Mr. Gillette about his back being sore, but never related it to a specific incident. On redirect examination, Mr. Pauls changed his testimony to reflect that Mr. Gillette was not a supervisor.<sup>12</sup> Further, Mr. Pauls testified Mr. Gillette leads a crew and had the authority to put workers on certain jobs and move them to other jobs. Mr. Pauls also indicated he did not know if a crew lead would be a supervisor, but he knew that a production foreman would be considered a supervisor.

At his attorney’s request, claimant saw C. Reiff Brown, M.D, on April 11, 2014. Claimant reported repeatedly lifting heavy beams around June 1, 2013, caused him to have low back pain which gradually increased in severity, with some involvement extending as far as his shoulder blades and downward into the back and side of his right leg. Dr. Brown diagnosed claimant with an acute lumbar sprain and recommended referral to an orthopedic surgeon, x-rays, an MRI, physical therapy, muscle relaxants, non-narcotic analgesics and anti-inflammatory medication. Dr. Brown noted claimant’s accident was the prevailing factor causing his present condition and need for additional treatment.

The judge’s Order states:

The Court preliminarily finds that the Claimant suffered a personal injury by accident that arose out of and [in] the course of his employment to his low back. On the issue of notice, the Claimant testified on Page 28 of his deposition that he reported an injury to his low back to Mr. Pauls and was told to wait until his other unrelated surgery was complete. Mr. Pauls agreed with this version of events on page 7 of his deposition. The Court finds that the Claimant gave notice of a potential lower back injury.

The Court requests an IME from Dr. Hufford for the purpose of obtaining his opinion on treatment recommendations for the Claimant. Parties are to prepare a joint letter to assist Dr. Hufford.

Respondent appealed.

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<sup>10</sup> *Id.*, Ex. 1.

<sup>11</sup> *Id.* at 15.

<sup>12</sup> *Id.* at 19.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.<sup>13</sup> The burden of proof is on the claimant. To determine if claimant satisfied his or her burden of proof, the trier of fact shall consider the whole record.<sup>14</sup>

K.S.A. 2013 Supp. 44-508 provides, in pertinent part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . .

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

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<sup>13</sup> K.S.A. 2013 Supp. 44-501b(b).

<sup>14</sup> K.S.A. 2013 Supp. 44-501b(c).

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2013 Supp. 44-520 states:

(a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(c) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

Board review of a judge's order is de novo on the record.<sup>15</sup> A de novo hearing is a decision of the matter anew, giving no deference to the judge's findings and conclusions.<sup>16</sup> The Board often opts to give some deference to a judge's findings and conclusions concerning credibility where the judge was able to observe the testimony in person.<sup>17</sup> The Board is as equally capable as a judge in reviewing evidence when a witness does not testify live in front of the judge.<sup>18</sup> No witness in this case testified before the judge.

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<sup>15</sup> See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995). See also K.S.A. 2013 Supp. 44-555c(a).

<sup>16</sup> See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

<sup>17</sup> It is "better practice" for the Board to provide reasons for disagreeing with a judge's credibility determinations. *Rausch v. Sears Roebuck & Co.*, 46 Kan. App. 2d 338, 342, 263 P.3d 194 (2011), *rev. denied* 293 Kan. 1107 (2012).

<sup>18</sup> See *Moore v. Venture Corp.*, 51 Kan. App. 2d 132, 142, 343 P.3d 114 (2015).

**ANALYSIS**

Claimant sustained a back injury as alleged on June 1, 2013. His injury by accident arose out of and in the course of his employment. The accident was the prevailing factor in his injury, medical condition and resulting disability.

This Board Member disagrees with the judge's specific finding that claimant provided timely and satisfactory notice to Mr. Pauls. Whether the conversation between claimant and Mr. Pauls occurred in mid-July or late-August 2013, notice for a June 1, 2013 injury by accident would be untimely.

Nonetheless, this Board Member affirms the result of the judge's ruling. Claimant provided notice of his injury by accident the same day it occurred to Mr. Gillette, including that he felt a pop in his back while working. While Mr. Gillette denied being a supervisor, Mr. Pauls initially testified crew leaders, such as Mr. Gillette, directly supervised workers. Such testimony is more credible than Mr. Pauls' subsequent backtracking. The greater weight of the remaining evidence shows that Mr. Gillette told workers what to do and to pick up their pace, *i.e.*, supervising.

Because Docket No. 1,069,086 was settled, the Division of Workers Compensation has no current jurisdiction over the claim. Any purported appeal of that matter is dismissed.

**CONCLUSIONS**

**WHEREFORE**, this Board Member affirms the result of the May 24, 2016 Order related to Docket No. 1,069,085 and dismisses Docket No. 1,069,086 for lack of jurisdiction.<sup>19</sup>

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July, 2016.

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HONORABLE JOHN F. CARPINELLI  
BOARD MEMBER

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<sup>19</sup> By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2015 Supp. 44-551(I)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

**TRACY A. MCHALEY**

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**DOCKET NOS. 1,069,085  
& 1,069,086**

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Honorable Thomas Klein